No. 16,530

IN THE

United States Court of Appeals

For the Ninth Circuit

B. A. WILLIAMS, II,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,312.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

JURISDICTIONAL STATEMENT.

Appellee agrees with Appellant's statement as to this Court's jurisdiction to hear this appeal, and as to the jurisdiction of the Court below.

STATEMENT OF THE CASE.

Appellant was in the oil business, operating out of Denver (R. 101 to 107). Part of his business involved the selling of oil drilling interests (R. 101 and 102),

which he was selling in Honolulu and Seattle during 1958 (R. 108 to 110).

From April 25, to May 14, 1958, a period of twenty days, Appellant passed the checks described in the Information.

The six-count Information filed against the Appellant upon his waiver of indictment (R. 3 to 8), alleged a mail fraud involving a check kiting scheme. It charged:

(1) On April 24, he deposited in Bank of Hawaii $44,000 worth of checks drawn on the Seattle-First National Bank (where his then balance was but $2,196.85);

(2) On April 30, he deposited in Seattle-First National $45,000 worth of checks drawn on Bank of Hawaii (where his then balance was but $10.65);

(3) On May 2, he deposited in the Hawaii Bank $45,500 of Seattle checks (where his then balance was $7,067.19);

(4) On May 6, he deposited in the Seattle Bank $46,200 of Hawaii checks (where his then balance was $510.65);

(5) On May 8, he deposited in the Hawaii Bank $50,000 worth of Seattle checks (where his then balance was $4,997.78);

(6) On May 14, he deposited in the Hawaii Bank $51,000 worth of checks drawn on the United States National Bank, Denver (where his then balance was $7.82).

The Information followed Form 3 of the sample forms attached to the Federal Rules of Criminal Procedure, and therefore did not allege that Appellant "knowingly" caused the mails to be used.

At trial, the Government produced uncontroverted testimony of a former agent for Appellant, and of the various banks' officials. Such testimony related to use of the mails, and through it various documents were received in evidence showing the amounts of the checks alleged and the balances in the respective accounts on the dates alleged. (Since Appellant did not at trial dispute any of those matters, and does not here allege any error therein, Appellee omits specific record page references thereto.)

A Bank of Hawaii official tstified that the Appellant stated to him that Appellant had been conducting a "check kite" during the period alleged (R. 61 and 62).

This constituted the Government's case.

The Appellant testified in his own behalf (R. 100 to 121). Appellant testified that on or about April 24, his agent in Seattle, Mr. Doing, had informed him that $46,000 worth of oil interests "had been sold and he was going to collect the money" (R. 111), which Appellant instructed him to deposit in the Seattle account.

Appellant then testified that many people were "hounding me for their money" (R. 111), so that when Doing informed him of the sale of the interests, "then I started writing checks to these people..." (R. 112).

Appellant went on to explain that the checks he then had drawn were: about $27,000 to a Jim Green (R. 112), $5,000 to T. N. Jordan, $5,000 to Fred Wallace, $1,100 to K. B. Well Service, and $650 to Appellant's father (R. 113).

Appellant then reiterated, "Well, when Mr. Doing advised me that this $46,000 was going to be deposited, I, of course, drew these particular checks that I just told you about." (R. 114). Later in his testimony, Appellant confirmed that these checks were written shortly after April 24 (R. 124).

However, as brought out on cross-examination, the Jim Green check was dated April 14. The T. N. Jordan check was for $500 and dated April 11, and the K. B. Well Service check of $1,100 was dated April 17 (R. 124). All of these dates of issue were prior to Doing's call on April 24, although on redirect examination, Appellant stated that the Jim Green check had actually been issued in March, 1958, but had been put back through after the Doing telephone call (R. 146). The dates of issue of the other checks were not denied. The check to his father was dated April 25 (R. 126).

Aside from the above-named checks, and the checks named in the Information, Appellant passed other checks during this period. These were: Montclair Insurance Company, April 25, $50; J. H. Ware, April 29, $500 (R. 126); John and Mary Burton, April 28, $358.50; Bank of Hawaii, May 2, $7,500; L. W. Kennedy, May 2, $500; Janoil, May 5, $500 (R.

134 and 135). In addition, two checks dated May 28 and June 11, 1958—both being therefore after the period of the check kite—were received in evidence. Both checks again were drawn on Appellant's personal account at Bank of Hawaii. The May 28 check was for $480, and the June 11 check, payable to Circle Drive Shopping Center, was for $25,000 (R. 137). Appellant stated that the latter check also had been issued in March (R. 144).

This constituted Appellant's other check-writing activities before, during and after the period covered by the kiting checks.

As previously stated herein, Appellant testified that the particular checks he referred to (R. 114) had been written on the basis of Doing's report that $46,000 worth of interests had been sold. On cross-examination, Appellant admitted that he knew that on April 24 there were no written agreements covering such sales (R. 128), and that he knew that the interests had been "sold" only on oral representation (R. 129).

At any rate, Appellant stated that when he learned that the $46,000 would not be forthcoming, " . . . Well, naturally, I was concerned because I had these checks out to these people and drawn against this account . . . And, of course, I knew that time was running and I was afraid that these checks would go back, insufficient funds. So I had Mr. Doing deposit some checks drawn against the Bank of Hawaii. And what I was trying to do is keep these checks from going back until I could get in money raised, until I could get this money raised." (R. 114).

Thus, Appellant himself testified that he had checks drawn against Bank of Hawaii and deposited in Seattle, so as to provide temporary credit. Appellant also testified that he told his Honolulu representative to draw and deposit additional checks in Honolulu (presumably against the Seattle or Denver accounts) " . . . so that they would have something on their ledger sheets rather than overdrawn account . . ." (R. 115 and 116).

In addition to these statements, Appellant admitted that he did later tell the Bank of Hawaii official that he had been conducting a check kite (R. 138), although Appellant stated "I don't even know what that word means." (R. 139).

The jury found Appellant guilty on each of the six counts (R. 9), and he thereafter perfected this appeal.

ARGUMENT.

POINT I. "KNOWINGLY" CAUSING THE MAILS TO BE USED IS NOT AN ELEMENT OF THE OFFENSE UNDER SECTION 1341.

Appellant here argues that the Information must fall because it does not charge him with *knowingly* causing the mails to be used.

It is of course true that if the charge omits an element of the offense, then the charge must fall. Therefore, the question here is, is knowledge an element of Sction 1341? Appellant assumes that it is, but the Supreme Court says it is not.

> "The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a

> scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It it not necessary that the scheme contemplate the use of the mails as an essential element . . . Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."
>
> *Pereira v. U. S.,* 347 U. S. 1, 8 (1954).

Appellee refers the Court to *U. S. v. Weisman,* 83 F. 2d 470 (CCA 2 1936), wherein was considered the old version of § 1341 [being 18 U.S.C. § 338 (1940 ed.)] which contained the same language as herein applicable. In that case, the indictment had charged that the defendant did "knowingly place and cause to be placed . . .", but the lower court's charge to the jury had omitted the word "knowingly". In commenting thereon, Augustus N. Hand stated, at p. 474:

> "But *'knowingly'* has not been construed as involving absolute knowledge or intent. It is sufficient if the use of the mails may fairly be foreseen by a defendant as a step in the execution of a scheme to defraud . . . [citing cases] . . . The clause containing that word was not introduced into the statute until 1909 . . . and, in our opinion, did no more than to require that the steps in the causal chain which resulted in delivery through the mails should have been knowingly set on foot. For example, . . . if a letter had been mailed without authority which the defendant or his agent had placed in a desk with no intent to have it posted, the act of knowingly causing it to

> be delivered by mail would not have been performed. . . . [But] . . . we can see no difference between causing a letter to be placed in an authorized depository for mail matters or in '*knowingly*' causing it 'to be delivered by mail' . . . The knowledge required is at most that the steps taken to execute the fraudulent scheme may under the circumstances known to the defendant naturally and probably result in the use of the mails . . ." (Emphasis by the Court.)

It is to be noted that in the case at bar, the Court did use the word knowingly in its charge to the jury, and did render an appropriate instruction with regard to the natural and probable use of mails flowing from the defendant's check-kiting (R. 151).

In *Webb v. United States,* 191 F. 2d 512 (10th Cir. 1951), in commenting upon Appellant's claim that his indictment did not charge an offense under § 1341, the court stated, at p. 515,

> "It is alleged that the defendants devised a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and that the United States mails were used for this purpose. The scheme and artifice is set out with such clarity that there could be no doubt or uncertainty as to the nature of the offense charged. No further allegation of intent or knowledge is necessary or required by the statute."

See *Kreuter v. United States,* 218 F. 2d 532 (5th Cir. 1955), which upheld the wording used in the indictment therein, since the elements of the offense under § 1341 were clearly charged. The indictment in

the *Kreuter* case did not use the word "knowingly." The indictment is set out in full at 119 F. Supp. 227 (W.D. Texas 1954).

In *Abbott v. United States,* 239 F. 2d 310 (5th Cir. 1956), the court stated at p. 314,

> " . . . [it is] . . . immaterial whether the probable, likely use of the mails was contemplated either at the outset or during the performance of the scheme . . . [citation] . . . The statute forbids the *use* of the mails as the means of consummating frauds, and if the mail is used in its actual execution, it matters not whether it was intended or anticipated . . . [citing cases] . . ." (Emphasis by the court.)

The vital thing is *use* of the mails *(Abbott),* and it does not matter whether or not one actually *intends* to so use the mails *(Pereira).* Since one therefore can violate the statute without even intending to use the mails, it is difficult to follow why, as Appellant argues, he must be charged with knowledge of such use.

Knowledge of use of the mails is not an element of the offense, and its omission from the Information herein was harmless. Moreover, as the above cases point out, "knowingly" causing the mails to be used may be the farthest thing from a person's mind—yet he can fall under the ban of the statute.

POINT II. THE EVIDENCE FULLY SUPPORTS THE VERDICT.

Appellant argues, in three additional points (Op. Br. 12 to 17), that in various particulars the evidence

was insufficient, although Appellant does not stress these points strongly.

Specifically, Appellant argues that the evidence failed to show a fraudulent scheme. Appellant mentions that no personal gain was realized, although admitting that none was necessary. He argues, however, that the lack of any financial gain implies a lack of fraudulent scheme.

But the success or failure of the scheme has nothing to do with the existence of a scheme to defraud. *United States v. Feldman,* 136 F. 2d 394 (2d Cir. 1943).

In *United States v. Broxmeyer,* 192 F. 2d 230, 232 (2d Cir. 1951), the court made the following comment appropriate to the case at bar:

> "He [the defendant] insists that intent to defraud was not proved and that, since intent is an essential element . . . [of § 1341] . . . , his conviction cannot stand. . . . The Government put in persuasive evidence showing his desperate need at this time for cash, and his frantic efforts to obtain it before the deposit of these checks. The fact that . . . [the defendant] . . . was the unfortunate victim of his own financial manipulations, or that he would have paid these checks if his check-cashing chain had not broken, does not alter his intent to defraud, if he had no reason to believe that his legitimate sources of income would suffice to make the checks good."

Appellant next contends that the evidence failed to show that he intended the mails to be used, and that any scheme involved was contemplated before the mails were used.

The first of these contentions is of course answered by *Periera v. United States,* 347 U.S. 1 (1954), and by *Stevens v. United States,* 227 F. 2d 5, 8 (8th Cir. 1955), where the court stated, "It is obvious from a reading of the statute that is was not necessary that . . . [the defendant] . . . himself deposited the checks or cash letters in the mail. It is sufficient that he caused it to be done."

The second of these contentions—that the scheme was completed before the mails were used—is also without merit. *Stevens v. United States, supra; United States v. Lowe,* 115 F. 2d 596 (7th Cir. 1941); *Deschenes v. United States,* 224 F. 2d 687 (10th Cir. 1955). *Kann v. United States,* 323 U.S. 88 (1944) had very different facts and its scope was self-limiting, and was carefully so limited and distinguished in *United States v. Sheridan,* 329 U.S. 379 (1946).

The evidence "must be viewed in the light most favorable to support the judgment." *Williams et al. v. United States,* 9th Cir. (Dec. 21, 1959), citing *Glasser v. United States,* 315 U.S. 60 (1942); *Robinson v. United States,* 262 F. 2d 645 (9th Cir. 1959). Even without such principle, Appellant's position is untenable. A cursory review of the record establishes beyond any doubt the pattern set up by the checks actually kited, and the use of the mails; the fact that the dedefendant knew and intended what he was doing—he said so on the witness stand; the fact that he was kiting checks—he admitted it; the fact that his kite was intentionally devised to provide temporary credit —he said so on the witness stand.

Appellee submits that these contentions by Appe lant are completely without merit.

CONCLUSION.

The appeal fails to show any grounds sufficient fo reversal.

Dated, Honolulu, Hawaii,
January 26, 1960.

Respectfully submitted,

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